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No.
IN THE
Supreme Court of the United States

October Term, 1983

HUDSON BURRELL, DORIS MARGARET BURRELL, and SCOTT
WHELAN,

Petitioners,

vs.

COUNTY OF SACRAMENTO, STATE OF CALIFORNIA, FRANK
WALLACE, LAIRD STANKEWITZ, ROBERT CLARE, and TOM
MOAD,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

1. Does the decision of this Court, in *Martinez v. California* (444 U.S. 277), apply with equal force to all state immunity statutes, without regard to the "discretionary" or "ministerial" acts of state officials, or the public policy rationale of the subject state statute?
2. Can the negligent conduct of a prison official, which permits a prisoner to escape, serve as a basis for a Civil Rights action, under 42 U.S.C. Section 1983, by an individual who is subsequently injured by the escaped prisoner?
3. Can the issue of causal connection (*i.e.*, remoteness) between the alleged negligent conduct of state officials, and the deprivation of life and property interests, be properly determined in the summary fashion of a motion to dismiss?

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COUNTY OF SACRAMENTO, STATE OF CALIFORNIA, FRANK
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MOAD,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of the United States:

The petitioners, Hudson Burrell, Doris Margaret Burrell, and Scott Whelan, pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals, for the Ninth Circuit, that was rendered and entered on May 9, 1983, affirming the Order of Dismissal of the United States District Court, for the Central District of California, which was entered by the District Court on July 21, 1982.

**I.
OPINION BELOW.**

The written Memorandum of Decision of the U.S. Court of Appeals is attached hereto as Appendix "A".

**II.
JURISDICTION.**

The Order of the United States Court of Appeals sought to be reviewed herein was rendered and entered on May 9, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

**III.
STATUTES INVOLVED.**

California Government Code, Section 845.8(b).

Section 845.8. Parole or release of prisoner; escape of prisoners.

Neither a public entity nor a public employee is liable for:

- (b) Any injury caused by:
 - (1) An escaping or escaped prisoner;
 - (2) An escaping or escaped arrested person; or
 - (3) A person resisting arrest.

(Added by Stats. 1963, c. 1681, p. 3279, Section 1.
Amended by Stats. 1970, c. 1099, p. 1958, Section 8.)

42 U.S.C. Section 1983.

Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IV.

UNITED STATES CONSTITUTION.

Article VI, Clause 2.

ARTICLE VI. — DEBTS VALIDATED.

SUPREME LAW OF LAND

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to Contrary notwithstanding.

Article V.

No person shall be . . . deprived of life, liberty, or property, without due process of law;

Article XIV.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V.

STATEMENT OF THE CASE.

The important issues in this case arose out of facts which are specifically within the exclusive knowledge of the respondent COUNTY OF SACRAMENTO. Petitioners, having been deprived, by the trial court, of the ability to conduct discovery, and, therefore, allege on information and belief, the following facts:

1. Prior to August, 1980, the defendant LAIRD STANKEWITZ was convicted by an Inyo County criminal court

of several counts of violent felonies, including armed robbery. He had several prior convictions and was considered by the trial court as being a dangerous and violent person. As a result, he was sent to Rio Cofumnes correctional facility with court orders that he be placed in a high security detention facility while awaiting sentencing.

2. In disregard of the specific court orders, the prison warden, defendant FRANK WALLACE, permitted prisoner STANKEWITZ to exercise in an open, unfenced prison yard, without guards or other supervision. Petitioners are informed and believe that defendant KIMMEL CONSTRUCTION CO. had been hired to repair and remodel certain areas of the prison facility, and the fencing in the subject area had been removed during the construction work.

3. In August, 1980, while left unattended and unsupervised in the open area, prisoner STANKEWITZ was permitted to merely walk away from the so-called "high security" facility to which he was remanded by the trial court.

4. Three months later, on November 3, 1980, in the rural area of the San Bernardino mountains, the escapee STANKEWITZ brutally murdered the son of petitioners HUDSON and MARGARET BURRELL, and brutally assaulted and battered petitioner SCOTT WHELAN. STANKEWITZ was convicted of first degree murder for his crimes and was sentenced to death, in November, 1981. He is currently on death row at San Quentin State Prison.

5. The respondents ROBERT CLARE and TOM MOAD were named as defendants in that it is alleged that they gave dangerous weapons and shelter to escapee STANKEWITZ following his escape.

6. On March 18, 1982, petitioners filed their complaint in the U.S. District Court, and the defendants State of Cal-

ifornia and the County of Sacramento filed separate motions for dismissal.

7. On July 21, 1982, the trial court dismissed petitioners complaint, as against each and every respondent, on the grounds that the complaint failed to state a cause of action and lack of pendent jurisdiction (against the individual defendants) as a result thereof.

8. The petitioners timely filed their notice of appeal to the United States Court of Appeals on August 10, 1982.

9. On May 9, 1983, the Court of Appeals, relying almost exclusively on this Court's previous decision in *Martinez v. California* [444 U.S. 277, (1979)], affirmed the dismissal order of the District Court.

VI.

REASONS FOR GRANTING THE WRIT.

Because of conflicting state and federal court decisions, regarding the constitutional validity of state immunity statutes in areas which relate to important individual rights guaranteed by the U.S. Constitution, and the resulting uncertainties concerning the status of the law, it is imperative that this Court clarify, and delimit, those permissible "state" intrusions upon an individual's Constitutional rights under the guise of state immunity statutes.

For example, in the case at bench, the Petitioners were denied due process in that they were deprived of the right of discovery. They were not permitted to obtain facts and evidence from the defendants, which was in the exclusive possession of a governmental agency, which were necessary to prove an action under 42 U.S.C. Section 1983. Instead, the trial court granted the governmental agencies' motions to dismiss on the grounds that petitioners' complaint failed to state facts sufficient to state a claim under 42 U.S.C. Section 1983. The trial court relied upon this Court's decision

in *Martinez v. California* (*id.*) in making its ruling.

The language in *Martinez*, relied upon by the trial and appellate courts, concerned the absence of a "causal connection" between the state official's acts and the deprivation of life and property interests claimed by the petitioners'. The courts were concerned about the "remoteness" of the petitioner's injuries and the state conduct of which they complained.

The appellate court concluded that the plaintiffs failed to state a valid Section 1983 claim because (1) "The escapee was in no sense an agent of the county or its officials, (2) the injury took place three months after the escape, and (3) there was no reason to believe that these victims, as distinguished from the public at large, faced any special danger."

What the trial court failed to properly consider is that each of the determinations it made were "factual issues" which required evidence and development through discovery. As this Court (and others) have uniformly ruled, such "causal connection" or "remoteness" issues are determined on a case by case basis, after a careful weighing of the evidence. Here, the petitioners were not permitted to obtain the necessary evidence, nor were they permitted to amend their pleadings to reflect the facts learned through discovery. DISCOVERY WAS NOT PERMITTED.

Important facts, such as a possible conspiracy between the prison warden and escapee, were not permitted to be discovered or developed in the case.

Issue #1.

Does the Decision of This Court, in *Martinez v. California* (444 U.S. 277), Apply With Equal Force to All State Immunity Statutes, Without Regard to the "Discretionary" or "Ministerial" Acts of State Officials, or the Public Policy Rationale of the Subject State Statute?

This Court has yet to declare, that, given the appropriate factual circumstances, a state immunity statute must yield to the supreme law of 42 U.S.C. Section 1983. The answer

appears, clearly, to be in the affirmative. But, it cannot be expressly found in the decisions of this Court.

In the *Martinez* case, this Court considered the constitutional validity of California *Government Code* Section 845.8(a) concerning the absolute immunity of parole officers in making "discretionary" decisions regarding the terms and conditions of parole.

The trial court, in the case at bench, failed to note the important distinctions between the type of "discretionary" decisions covered by *Government Code* Section 845.8(a) and the "ministerial" decisions required Section 845.8(b). In *Martinez*, this Court noted that under Section 845.8(a), there was a "rational" relationship between the State's purpose and the statute. In fact, this Court declared ". . . the California Legislature could reasonably conclude that judicial review of a parole officer's decisions 'would inevitably inhibit the exercise of discretion' (*Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, at 558).

This Court concluded that the inhibiting effect could impair the State's ability to implement a parole program designed to promote rehabilitation of inmates as well as security within the prison walls by holding out a promise of potential rewards.

However, unlike the statute in *Martinez*, Section 845.8(b) does not limit its grant of immunity to "discretionary" decisions of state officials. It does not deal with any "public policy" that could be construed as "beneficial" to inmates or the public at large. Instead, Section 845.8(b) provides a blanket immunity to prison officials, regardless of the nature of their acts.

Our courts have, for a long time, made important distinction between the "discretionary" and "ministerial" acts of public officials.

This important distinction was made by the California Supreme Court in the case of *Johnson v. State of California* [69 Cal.2d 782, 73 Cal.Rptr. 240 (1968)]. In *Johnson*, the court distinguished "discretionary" and "ministerial" acts in the following manner:

Generally speaking, a discretionary act is one which requires the exercise of judgment or choice. Discretion has also been defined as meaning equitable decision of what is just and proper under the circumstances. (citations). Finally, a discretionary act is one which requires 'personal deliberation, decision and judgment' while an act is said to be ministerial when it amounts 'only to . . . the performance of a duty in which the officer is left no choice of his own.' (citations). (*Id.* at pages 787-788).

The court refused the "State's invitation" to get "enmeshed in the deep thicket of semantics" in determining, as a "purely literal matter" " 'where the ministerial and imperative duties end the discretionary powers begin.' " (*id.* at page 788). Instead, the court cited the leading case of *Lipman v. Brisbane Elementary School Dist.* (55 Cal.2d 1224, 11 Cal.Rptr. 97), and declared:

Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages. (*Id.* at page 789).

The California Supreme Court rejected the State's argument that a denial of the State's immunity would hamper

or interfere with important State interests. The Court reminded the State that California's statutory provisions for indemnification of public officials removes any concern the State may have for the preservation of "ardor in the performance of public duties." Furthermore, the Court pointed out that if an injured party collects a judgment from a public entity, that entity can exercise only extremely limited rights against the employee whose conduct gave rise to the decision. (*Id.* at pages 790-791).

In conclusion, the court declared:

. . . We consider it unlikely that the possibility of government liability will be a serious deterrent to the fearless exercise of judgment by the employee.

The court continued, by declaring:

In any event, however, to the extent that such a deterrent effect takes hold, it may be wholesome. An employee in a private enterprise naturally gives some consideration to the potential liability of his employer, and this attention unquestionably promotes careful work; the potential liability of a governmental entity, to the extent that it affects primary conduct at all, will similarly influence public employees. (*Id.*)

In language directly applicable to the case at bench, the court declared:

Once the determination has been made that a service will be furnished and the service is undertaken, then public policy demands . . . that government be held to the same standard of care the law requires of its private citizens in the performance of duties imposed by law or assumed. (*Id.* at page 796).

Even though the *Johnson* case dealt with the issue of immunity of a parole officer under Section 845.8(a), the court reiterated the rule of immunity for "discretionary" decisions, but, declared that while the governmental official

was protected for his discretionary decision of whether to grant or deny parole, the "implementation" of his decision involved "ministerial" actions, and in such cases, he was not protected by the immunity purported conferred by Section 845.8(a).

Since this Court, in *Martinez* (444 U.S. 277), dealt with the "discretionary" acts of a parole officer, and the important public reasons for immunity in such cases, the trial court erred by inflexibly applying the doctrine of *Martinez* to the mandatory and "ministerial" acts of the governmental official in the case at bench.

Issue #2.

Can the Negligent Conduct of a Prison Official, Which Permits a Prisoner to Escape, Serve as a Basis for a Civil Rights Action, Under 42 U.S.C. Section 1983, by an Individual Who Is Subsequently Injured by the Escaped Prisoner?

Clearly, under the supremacy clause and 42 U.S.C. Section 1983, and under recent decisions of this Court, including *Martinez v. California* (*op. cit.*), the subject California *Government Code*, Section 845.8(b) is Constitutionally defective as an impermissible grant of blanket immunity to governmental officials. This Court has on numerous occasions previously ruled that local governmental officials could no longer be protected from liability for their negligent or intentionally wrongful conduct by state immunity statutes. [See *Quern v. Jordan* (440 U.S. 332, 99 S.Ct. 1139); *Monnell v. New York City Dept. of Social Services* (436 U.S. 658, 98 S.Ct. 1356); *Hutto v. Finney* (437 U.S. 678, 98 S.Ct. 2565)].

Thus, the local governmental officials, in the case at bench, should not be protected from liability for their neg-

ligent and/or wrongful conduct, solely by virtue of the unconstitutional blanket immunity provided in California *Government Code*, Section 845.8(b).

Issue #3.

Can the Issue of Causal Connection (i.e. Remoteness) Between the Alleged Negligent Conduct of State Officials, and the Deprivation of Life and Property Interest, Be Properly Determined in the Summary Fashion of a Motion to Dismiss?

Herein lies the gravamen of petitioners' claim on appeal, on the basis of current stare decisis law. The premise, as apparently accepted and applied by the trial court, is that although the facts and evidence is within the peculiar and exclusive possession of a governmental agency, a litigant must plead in his initial (and only) complaint, those facts which conclusively establish a violation of 42 U.S.C. Section 1983. According to the rationale of the trial court in the case at bench, no discovery or amendment to the complaint will be allowed.

Such an inflexible method of "fact finding" is unfair, unjust, and unreasonable. It encourages the withholding and sequestration of indispensable evidence by local governmental bodies, all to the prejudice of "justice" and "fairness" under the U.S. Constitution. It also creates an almost insurmountable burden upon the individual citizens of each State in the prosecution of Civil Rights actions when the knowledge of the facts, and the evidence, is solely in the possession of the governmental agency.

VII.

CONCLUSION.

For all of those reasons stated above, it is clear that the trial court misconstrued this Court's decision in *Martinez v. California* (op. cit.), and in doing so deprived the peti-

tioners of due process and other important Constitutional rights. For these reasons petitioners' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAWSON & LAWSON,

By FREDERICK J. LAWSON,

Attorneys for Petitioners.

APPENDIX A.

Memorandum (Memorandum of Decision by U.S. Court of Appeals).

United States Court of Appeals for the Ninth Circuit.

Hudson Burrell, Doris Margaret Burrell, and Scott Whelan, Plaintiffs-Appellants, vs. County of Sacramento, State of California, Frank Wallace, Laird Stankewitz, Robert Clare and Tom Moad, Defendants-Appellees. No. 82-5749. D.C. #CV 82-1333RJK.

Filed: May 9, 1983.

Submitted May 3, 1983.

Appeal from the United States District Court for the Central District of California. District Judge Robert J. Kelleher, Presiding.

Before: WRIGHT and SCHROEDER, Circuit Judges, and REED,* District Judge.

Plaintiffs appeal the dismissal of their suit for declaratory and injunctive relief, and damages under 42 U.S.C. § 1983 and pendent claims against the state, Sacramento County, the Sheriff's Department, Sheriff Wallace, Kimmell Construction Company as an alleged state agent, prison escapee Laird Stankewitz, and accomplices Clare and Moad.

Claims against the state qua state are constitutionally barred. *Alabama v. Pugh*, 438 U.S. 781, 781-82 (1978); *Peters v. Lieuallen*, 693 F.2d 966, 970 (9th Cir. 1982); *V.O. Motors v. California St. Bd. of Equalization*, 691 F.2d 871, 872 (9th Cir. 1982). Plaintiffs' reliance on the distinction between "prospective" and "retrospective" relief is inapposite where the complaint is brought against the state itself and not an individual officer. See *Washington v.*

*Of the District of Nevada.

Penwell, Nos. 81-3211, 82-3449, slip. op. at 908 (9th Cir. March 3, 1983).

The actions against the county, the Sheriffs' Department and its employee were properly dismissed for failure to state a claim under 42 U.S.C. § 1983. The highly attenuated causal connection between the alleged omissions of the state actors and the deprivation of life and property interests cannot support a claim pursuant to Section 1983 to redress a Fourteenth Amendment violation. *Martinez v. California*, 444 U.S. 277, 284-85 (1979).

The escapee was in no sense an agent of the county or its officials, the injury took place three months after the escape, and there was no reason to believe that these victims, as distinguished from the public at large, faced any special danger. "Although a § 1983 claim has been described as 'a species of tort liability,' *Imbler v. Pachtman*, 424 U.S. 409, 417, it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute." *Martinez*, 444 U.S. at 285.

The district court properly declined to exercise jurisdiction over pendent state claims. *Moor v. County of Alameda*, 411 U.S. 693, 714-15 (1973).

AFFIRMED.

APPENDIX B.

**Order (Order of Dismissal by
U.S. District Court).**

United States District Court, Central District of California.

Hudson Burrell, Doris Margaret Burrell, and Scott Whelan, Plaintiffs, v. County of Sacramento, State of California, Frank Wallace, Laird Stankewitz, Robert Clair, Kimmel Construction Company, and Tom Moad, Defendants. No. CV 82-1333-RJK (MCX).

Filed: July 20, 1982.

This cause came on for hearing before this court on July 12, 1982, on the Motion to Dismiss Under Rule 12(b) filed by defendants County of Sacramento, Frank Wallace, and County of Sacramento Sheriff's Department, contending the plaintiffs' Complaint failed to state a claim against these defendants upon which relief could be granted.

It appearing to the Court that the Complaint does not state a claim under 42 U.S.C. § 1983 upon which relief may be granted, it is hereby ORDERED that the Complaint is dismissed as to defendants County of Sacramento, Frank Wallace, and County of Sacramento Sheriff's Department for lack of federal subject matter jurisdiction and failure to state a claim upon which relief may be granted.

It is further ORDERED that the Complaint is dismissed as to defendants Laird Stankewitz, Robert Clair, Kimmel Construction Company, and Tom Moad for lack of federal subject matter jurisdiction.

The Clerk shall send, by United States mail, a copy of this Order to counsel for the parties.

DATED: July 21, 1982.

/s/ Robert J. Kelleher,
ROBERT J. KELLEHER
United States District Judge

APPENDIX C.

**Reporter's Transcript of Proceedings
(Hearing of Motion for Dismissal).**

In the United States District Court, Central District of California.

Honorable Robert J. Kelleher, Judge Presiding.

Hudson Burrell, et al., Plaintiffs, v. County of Sacramento, et al., Defendants. No. CV 82-1333-RJK.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PLACE: Los Angeles, California

TIME: Monday, July 12, 1982

LESLIE L. RICHTER, CSR 840

Official Court Reporter

546 U. S. Courthouse

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LOS ANGELES, CALIFORNIA, MONDAY, JULY 12,
1982 Q. 10:00 A. M.

THE CLERK: Item 7, CV 82-1333-RJK, Burrell versus
County of Sacramento.

Counsel, please, state your appearances.

MISS HOGUE: Kristin Hogue, Deputy Attorney General
for the State of California.

MR. TAYLOR: John Taylor for defendants, County of
Sacramento, Sacramento County Sheriff's Department, and
Frank Wallace.

MR. LAWSON: Frederick Lawson representing the
plaintiffs.

THE COURT: Well, it seems to the court that this motion
to dismiss is well taken.

Is there anything to be added in opposition thereto beyond
what is already before the court, Mr. Lawson?

MR. LAWSON: Excuse me, your Honor. Are you referring
to the motion by the State of California or the motion
by the County of Sacramento?

THE COURT: Both.

MR. LAWSON: Well, your Honor, the State of California —
Let me begin with the County of Sacramento.

I think it is clearly erroneous under the law, because of
the U. S. Supreme Court decisions in Monell and the Monroe
v. Pape case, et al, which has held that local governmental
bodies, municipalities, et cetera, are no longer immune from
liability under the Civil Rights Act, and the county has taken
the position that as a governmental entity within the State of
California it qualifies under the immunity of Section 845.8(b) of
the Government Code.

Now, the case of Quern, and the U. S. Supreme Court cases, your Honor, as well as the Johnson case, has held that individuals — and that governmental bodies, local governmental bodies, are not immune and that the supremacy clause of the U. S. Constitution prevails over any state immunity statutes.

THE COURT: Well, Monell is very clear to the effect that a civil rights action under 1983 will lie against a governmental agency. But that presupposes that there will be a cause of action alleged upon which relief can be granted.

And there is a failure to state the kind of violation of 1983 here as against the county which would allow you to proceed.

Anything further on that aspect of it?

MR. LAWSON: Yes, your Honor.

It is the plaintiffs' contention that Section 1983 does not require an overt criminal intent on the part of any individual in order for liability to arise.

It is the plaintiffs' contention that Section 1983 also provides for willful, intentional and negligent conduct of a governmental official which as a result thereof causes injury.

Now, we have a plaintiff in this case that was directly injured — and I'm referring to Scott Whelan — who was directly injured as a result of the escape of this convicted felon from the penal institution, the correctional facility.

This man was a very dangerous — prior convictions, awaiting sentencing, supposedly in a high security detention facility.

THE COURT: Hold on a moment, if you will.

This contention that the acts of the escaped felon deprived the plaintiff of some right, without due process, is there an allegation that whatever was done, or omitted to be done, was done under color of state law?

MR. LAWSON: Yes, your Honor, there is.

THE COURT: What is the allegation?

MR. LAWSON: The complaint states that there were state rules and regulations, as well as a duty by the correctional facility and by ordinance in the County of Sacramento, as well as conduct required of the prison officials, and in violation of these requirements the escaped felon escaped and injured — murdered one person and injured Scott Whelan, the plaintiff.

THE COURT: What do you say to Martinez against the State of California in the Supreme Court on the really identical issue?

MR. LAWSON: It is not actually identical, your Honor. It is close in that it dealt solely with subsection (a) of 845.8 of the Government Code, and the California and U. S. Supreme courts have held that (a), which deals with parole officers, their conduct and their duties concerning the discretionary act of deciding whether to release somebody on parole or not, and the courts held that there is a very clear distinction between the discretionary duty of making a decision as to whether an individual should be released upon society as opposed to the ministerial duty of complying with rules and regulations in the performance of the duties.

Now, here there was no discretion exercised by the prison officials. It was clearly, blatantly and intentional and negligent at the same time, conduct which resulted in this escape by this felon.

Martinez, that case involved a parole board that had to weigh an individual's record to determine whether or not he had been rehabilitated and whether he should be released upon society.

Now, there are an entire host of cases in which the courts have held that because it is in the interest of society not to

impede the rehabilitation of parolees, and that it is in the interest of society not to burden parole officers with liability, that for public reasons the discretionary ministerial standard would be used.

And I've cited the case of Johnson, I believe, your Honor, in which the courts have held that the discretionary ministerial standards do not apply to (b) and a direct — the same question this court has just asked me was answered by the California Supreme Court and held that state immunity to these local officials does not apply in 845(b) as it might in 845(a), which was Martinez.

THE COURT: Very well. Anything further?

MR. LAWSON: Thank you, your Honor.

THE COURT: The respective motions of the State of California and the County of Sacramento are granted, each is granted, on the ground asserted, that is, the motion to dismiss and on its own motion the court accordingly dismisses the action as against the remaining defendants on the ground that there is no power on the part of the court under so-called pendent jurisdiction, or otherwise, to entertain the claims, the nonfederal claims, as against those defendants.

Counsel for each defendant, state and county, will prepare, serve and lodge, pursuant to Local Rule 7, an appropriate order as to each such defendant, carrying out the order.

CERTIFICATE.

In the United States District Court, Central District of California.

Honorable Robert J. Kelleher, Judge Presiding.

Hudson Burrell, et al., Plaintiffs, vs. County of Sacramento, et al., Defendants. No. CV 82-1333-RJK.

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing SEVEN pages are a true and correct transcript of the proceedings had in the above-entitled cause on July 12, 1982 and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of October, 1982.

/s/ Leslie L. Richter
LESLIE L. RICHTER, CSR 840
Official Court Reporter

APPENDIX D.

**Petitioner's Complaint Filed in
U.S. District Court.**

United States District Court, Central District of California.

Hudson Burrell, Doris Margaret Murrell, and Scott Whelan, Plaintiffs, vs. County of Sacramento, State of California, Frank Wallace, Laird Stankewitz, Robert Clair, and Tom Moad, Defendants. Case No. 82 1333. R.J.K. (MCX).

Filed: March 18, 1982.

COMPLAINT FOR DECLARATORY RELIEF, WRONGFUL DEATH, PERSONAL INJURIES, AND DAMAGES AND DEMAND FOR JURY TRIAL

A. JURISDICTIONAL ALLEGATIONS

1. This action arises under the Constitution of the United States of America, Article One, Section 8, Article Six, Section 2, and Amendment Five and Amendment Fourteen. The matter in controversy, exclusive of costs, exceeds the sum of \$10,000. This Court has jurisdiction under 28 U.S.C., Section 1331.

2. Further, this is an action brought under Title 42, Section 1983, of the United States Code, to redress the deprivation under color of the statutes of the STATE OF CALIFORNIA, of rights and privileges secured to plaintiff by Amendments V and XIV, and Article VI, Section 2, of the Constitution of the United States. This Court has jurisdiction under 28 U.S.C., section 1343.

3. This is an action for a declaratory judgment pursuant to 28 U.S.C., Section 2201 for the purpose of determining the constitutionality of the provisions of Section 845.8 of the California Government Code for damages, and such further relief as may be necessary and proper.

4. This is an action against the County of Sacramento, State of California, and its authorized agents, for injury resulting from the dangerous condition of its property and for the negligent acts and omissions of its employees.

5. This is an action against individual defendants for violation of Statute statue, wrongful death, negligence, assault and battery, and conspiracy.

6. Further, as to the claims for causes of action other than those relating to federal questions and constitutional rights of plaintiffs', the issues therein arise out of the same facts as those relating to federal questions and constitutional rights. Therefore, this Court has pendent jurisdiction thereover.

B. PARTIES

7. Plaintiffs, HUDSON BURRELL and DORIS MARGARET BURRELL (hereinafter sometimes collectively referred to herein as BURRELL), and SCOTT WHELAN (sometimes referred to herein as WHELAN), are residents of the CITY OF WOODLAND HILLS, County of Los Angeles, State of California. Plaintiffs BURRELL are husband and wife and have at all times mentioned herein resided at 23262 Gonzales Drive, Woodland Hills, California 91367. Plaintiff WHELAN has at all times mentioned herein resided at 22611 Berdon Street, Woodland Hills, California 91367.

8. Plaintiffs HUDSON BURRELL and DORIS MARGARET BURRELL are, respectively, the natural father and mother of RICHARD LAWRENCE BURRELL, deceased.

9. Defendant, COUNTY OF SACRAMENTO, California, is now and was at all times herein mentioned a political subdivision of the State of California, and defendant SACRAMENTO SHERIFF'S DEPARTMENT, is now and all times material herein mentioned an agency and subdivision thereof, each of which are existing under the laws

of the State of California and located in Sacramento County. Defendant FRANK WALLACE is a resident of the COUNTY OF SACRAMENTO and was at all material times hereto an employee of the defendant SACRAMENTO SHERIFF'S DEPARTMENT and held the rank of Captain in said Sheriff's department and was responsible for the management, operation, and maintenance of the subject SACRAMENTO COUNTY correctional facility referred to herein as "Rio Cofumnes".

10. Defendant KIMMEL CONSTRUCTION COMPANY is now and at all times mentioned herein was a subcontractor and an agent for the County of Sacramento and the State of California, and licensed as a contractor by the State of California.

11. Said defendant KIMMEL CONSTRUCTION COMPANY is a corporation duly licensed to do business in the State of California.

12. At all times material hereto, the defendants, and each of them, and their agents, and employees were acting under color of the ordinances of the COUNTY OF SACRAMENTO, and laws of the State of California.

13. The defendants, and each of them, at all times herein mentioned were the agents and employees of their codefendants and in doing the things hereinafter alleged were acting within the course and scope of such agency and the permission and consent of their codefendants.

C. STATE STATUTE INVOLVED

14. On or about the year of 1963, the State legislature of the State of California enacted Section 845.8 of the Government Code of California, as amended in 1970, The subject Section of the Government Code is entitled "Parole or release of prisoner; escape of prisoners" and provides in pertinent part as follows:

Neither a public entity nor a public employee is liable for:

(b) Any injury caused by:

(1) An escaping or escaped prisoner; . . .

A true and correct copy of said California Government Code Section is attached hereto as Exhibit "1" and incorporated by reference herein.

15. The subject Government Code section purports to provide "absolute immunity" to public entities and public employees from liability for injury caused to the public, and more particularly, to the citizens of the State of California.

D. FACTUAL ALLEGATIONS

16. Beginning in the year 1979, the County of Sacramento commenced construction, repair, and remodeling work at its penal detention and correctional facility known as "Rio Cofumnes Center" located at 12500 Bruceville Road, in the City of Elk Grove, California (sometimes referred to herein as "correctional facility").

17. Defendant KIMMEL CONSTRUCTION COMPANY was employed by defendant COUNTY OF SACRAMENTO as an independent contractor to construct, repair, and remodel said penal correctional facility.

18. On or about July 28, 1980, said defendant KIMMEL CONSTRUCTION COMPANY performed said construction, repair, and remodel work in such a grossly negligent and careless manner so that it rendered said facility to be in a dangerous and defective condition to the public in view of its purpose to serve as a penal detention and prison facility for prisoners considered dangerous to the public and requiring "maximum security".

19. As a proximate result of the gross negligence and carelessness of said defendant KIMMEL CONSTRUCTION COMPANY, a violent prisoner, one LAIRD STANKE-

WITZ (hereinafter referred to as "STANKEWITZ"), was permitted to escape from said correctional facility.

20. In August, 1980, following his escape, defendant STANKEWITZ was given hiding, shelter, and dangerous weapons by defendants ROBERT CLAIR and TOM MOAD, (hereinafter referred to respectively as CLAIR and MOAD) who acted with full knowledge of said escape and violent character of defendant STANKEWITZ.

21. On or about November 3, 1980, in the rural vicinity of the City of Trona, County of San Bernardino, California, said STANKEWITZ, armed with a deadly weapon provided to him by defendants CLAIR and MOAD, violently assaulted, battered, robbed and murdered RICHARD LAWRENCE BURRELL and, at said time and place, committed violent assault, battery, and robbery upon SCOTT WHELAN.

22. In August, 1981, defendant STANKEWITZ was tried and convicted of the first degree murder of said RICHARD LAWRENCE BURRELL, and on November 3, 1981, STANKEWITZ was sentenced to death by the Superior Court for the County of Inyo, State of California. Plaintiffs' are informed and believe that STANKEWITZ is currently in custody at the California San Quentin State Prison in the City of San Quentin, County of Marin, California.

23. Plaintiffs have no other legal remedy with which to enforce their federally protected Constitutional rights except by the institution of this civil action.

E. CAUSES OF ACTION

COUNT ONE — CHARGING ALLEGATIONS AGAINST THE STATE OF CALIFORNIA, FRANK WALLACE, COUNTY OF SACRAMENTO, COUNTY OF SACRAMENTO SHERIFF'S DEPARTMENT, and KIMMEL CONSTRUCTION COMPANY.

(Declaratory Relief and 42 U.S.C., Section 1983)

24. Plaintiffs hereby incorporate by reference paragraphs 1 through 23 of this Complaint as though fully set forth herein.

25. The subject statute, as contained in Section 845.8 of the Government Code of California, is unconstitutional on its face and/or as applied to plaintiffs in that it deprives plaintiffs of the right to maintain an action under 42 U.S.C. 1983. Said deprivation constitutes a violation of Article Four, Section 2, Clause 1, and the Fifth and Fourteenth Amendment, and the Supremacy Clause of the United States Constitution, as contained in Article VI, Section 2 of the United States Constitution.

26. The subject statute is further unconstitutional on its face and/or as applied in that it is vague, overbroad, and gives unlimited discretion and immunity to the State and its administrative officials in the conduct and performance of their official duties and obligations.

27. Said statute, and the threatened enforcement thereof will have a chilling effect on plaintiffs' constitutionally guaranteed right of redress against the deprivation of life, liberty, and property, without due process, and unless defendants are restrained and enjoined from enforcing said statute, plaintiffs, and each of them, will be unable to seek redress and recovery of the substantial damages suffered by reason of the official acts complained of herein.

28. The subject statute is is void and unconstitutional on its face and/or as applied to plaintiffs in that the subject matter of redress for wrongs committed by the State and its officials has been preempted by the Civil Rights Act of 1871, and by 42 U.S.C., Section 1983, and that said statute violates Article VI, Section 2, of the United States Constitution.

29. The subject statute is further void and unconstitutional on its face and/or as applied to plaintiffs in that it deprives plaintiffs of equal protection of the law, as guaranteed by the Fourteenth Amendment of the United States Constitution.

30. Furthermore, the subject ordinance is void and unconstitutional on its face and/or as applied in that it deprives plaintiffs of life, liberty, and property without due process of law, as guaranteed by the Fourteenth Amendment of the United States Constitution.

31. In addition, the subject statute is void and unconstitutional on its face and/or as applied to plaintiffs in that it constitutes an invalid exercise of the State police power in that said statute does not bear any reasonable relationship to the public safety, health, morals, or general welfare, and application thereof is unreasonable, arbitrary, discriminatory, oppressive, and confiscatory, and constitutes an unwarranted interference with substantial property rights.

32. The acts and conduct of the defendants, and each of them, are acts and conduct under the color of state law.

33. Unless this Court enjoins and restrains defendants from enforcing said statute, plaintiffs will suffer the most serious, immediate and irreparable injury in that they will be deterred, intimidated, hindered and prevented from exercising fully and vigorously their most fundamental Constitutional rights guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C., Section 1983.

34. Plaintiffs have no adequate remedy at law to protect their constitutional rights as alleged herein.

35. A justiciable controversy exists as to the constitutionality of said statute between plaintiffs and defendants.

36. As a result of the action of defendants, plaintiffs have been damaged in the sum of \$9,000,000.00

COUNT TWO — CHARGING ALLEGATIONS
AGAINST DEFENDANTS STATE OF CALIFORNIA,
FRANK WALLACE, COUNTY OF SACRAMENTO,
COUNTY OF SACRAMENTO SHERIFF'S DEPART-
MENT, and KIMMEL CONSTRUCTION COMPANY.
(WRONGFUL DEATH & PERSONAL INJURIES)

37. Plaintiffs hereby incorporate by reference paragraphs 1 through 23 of this Complaint as though fully set forth herein.

38. On July 28, 1980, defendants, and each of them owned, operated, maintained, and controlled the correctional facility known as "Rio Cofumnes Center", which property is more particularly described in paragraph 16 above. Defendant FRANK WALLACE was then and now an employee of defendant COUNTY OF SACRAMENTO and the Sheriff's Department of said County, and held the rank of Captain, and further, was responsible for the operation and maintenance of the subject correctional facility known as "Rio Cofumnes Center".

39. At said time and place, and prior thereto, the above-described public property was in a dangerous condition, that created a substantial risk of the type of injury hereinafter alleged when the property was used with due care in a manner that it was reasonably foreseeable that it would be used in that the fencing and other security devices, used to prevent prisoners from escape, was removed, damaged, or otherwise in such a condition as to permit defendant STANKEWITZ to escape from said correctional facility.

40. Furthermore, defendants permitted said defendant STANKEWITZ, a known dangerous and violent convicted felon, to enter into the yard area of said property without adequate supervision or security guards, and without adequate fencing and other security measures in said yard area,

thus rendering said property in a dangerous condition to the public and to the plaintiffs.

41. Defendants had actual knowledge of the existence of the condition and knew or should have known of its dangerous character a sufficient time prior to July 28, 1980, to have taken measures to protect against the dangerous condition. Defendant FRANK WALLACE and defendant KIMMEL CONSTRUCTION COMPANY, employees and agents of the defendant COUNTY OF SACRAMENTO, had the authority and the responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds or other means were immediately available to them.

42. On July 28, 1980, defendant STANKEWITZ escaped from the correctional facility and on November 3, 1980, said defendant violently assaulted, battered, robbed, and murdered decedent RICHARD LAWRENCE BURRELL in Trona, California, County of San Bernardino, and did further, violently assault, batter, and rob plaintiff SCOTT WHELAN at the same place and time.

43. Prior to the death of decedent, plaintiffs BURRELL lived with him and were dependent upon him for their support and maintenance and decedent was a faithful and dutiful son to plaintiffs.

44. As a proximate result of the dangerous condition on defendant's property, and the death of decedent, plaintiffs BURRELL have suffered pecuniary loss resulting from the loss of the society, comfort, attention, services, and support of decedent in the sum of (3,000,000.00).

45. As a further proximate result of the dangerous condition of defendant's property, and the death of decedent, plaintiffs BURRELL have incurred funeral and burial expenses in the sum of \$2,000.00, which is the reasonable

value of such services.

46. As a proximate result of the aforesaid dangerous condition on defendant's property, and the violent assault, battery, and personal injuries suffered by plaintiff WHELAN, said plaintiff was hurt and injured in his health, strength, and activity, sustaining injury to his body and shock and injury to his nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. Plaintiff WHELAN is informed and believes and thereon alleges that such injuries will result in some permanent disability to him. As a result of such injuries, plaintiff WHELAN has suffered general damages in the amount of \$3,000,000.00.

COUNT THREE — CHARGING ALLEGATIONS
AGAINST DEFENDANTS, LAIRD STANKEWITZ,
ROBERT CLAIR AND TOM MOAD

47. Plaintiffs hereby incorporate by reference paragraphs 1 through 23 of the allegations contained in their complaint as though fully set forth herein.

48. On or about August, 1980, immediately following the escape by defendant STANKEWITZ from the subject County correctional facility, defendants ROBERT CLAIR and TOM MOAD provided STANKEWITZ with safe hiding and shelter at an abandoned mining camp known and referred to as "Clair Camp". In so doing, each of the defendants, CLAIR and MOAD, acted with the knowledge of STANKEWITZ's unlawful escape, and with the knowledge of the violent and dangerous character of STANKEWITZ.

49. To further compound their wrongful conduct and conspiracy, defendants CLAIR and MOAD, at said time and place, provided STANKEWITZ with dangerous weapons, including a 22 automatic rifle.

50. On or about November 3, 1980, at the above-mentioned "Clair Camp", defendant STANKEWITZ, while armed with a 22 caliber automatic rifle, brutally robbed and murdered RICHARD LAWRENCE BURRELL, the son of plaintiffs HUDSON BURRELL and DORIS MARGARET BURRELL.

51. At said time and place, while armed with the aforesaid deadly weapon, defendant STANKEWITZ brutally assaulted, battered, falsely imprisoned, and robbed plaintiff SCOTT WHELAN.

52. As a result of the action of defendants, and each of them, plaintiff BURRELLs have been damaged in the sum of \$3,000,000.00 each, and, plaintiff WHELAN has been damaged in the sum of \$3,000,000.00.

53. Defendants' conduct was wanton, wilful and in total disregard for the rights, and the health, safety, and well-being of the public and of plaintiffs, in particular, and by reason thereof, plaintiffs are entitled to punitive damages against defendants in the sum of \$3,000,00.00 each.

F. PRAYER FOR RELIEF

WHEREFORE, plaintiffs, and each of them, pray for relief as follows:

1. That this Court issue a declaratory judgment, declaring that Section 845.8 of the California Government Code is null and void on its face and/or as applied to plaintiffs herein as violative of the United States Constitution; and

2. For general damages to plaintiffs HUDSON BURRELL and DORIS MARGARET HUDSON in the amount of \$3,000,000.00 each, and to plaintiff SCOTT WHELAN in the amount of \$3,000,000.00; and

3. For Special damages to plaintiffs HUDSON BURRELL and DORIS MARGARET BURRELL in the amount of \$2,000.00; and

4. For punitive damages to plaintiffs, and each of them, against the defendants, and each of them, in the amount of \$3,000,000.00 each; and

5. For costs of suit herein; and

6. For reasonable attorneys fees; and

7. For such other and further relief as the Court may deem just.

LAWSON & LAWSON

By: /s/ Frederick J. Lawson

FREDERICK J. LAWSON

Attorney for Plaintiffs

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